Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1522

R.B. POTASHNICK,
CONTINENTAL CASUALTY COMPANY, and
J.B. CONVERSE AND COMPANY, INC.,
Petitioners,

versus

PORT CITY CONSTRUCTION COMPANY,
UNITED STATES FIDELITY AND GUARANTY COMPANY,
and THE CITY OF MOBILE,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I

OPINION BELOW

The opinion of the Court of Appeals is reported at 609 F. 2d 1101, reh. den. 613 F. 2d 1101 (5 Cir., 1980).

II

JURISDICTION

Respondents adopt Petitioners' statements.

III

QUESTION PRESENTED

The question presented to this Honorable Court is whether any ground exists in the subject action to warrant the granting of a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

IV

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondents adopt Petitioners' statement.

V

STATEMENT OF THE CASE

This case was filed by R. B. Potashnick (Potashnick) against Port City Construction Company, Inc. (Port City) and its bonding company, United States Fidelity and Guaranty Company ("USF&G"), on October 5, 1973. Jurisdiction was based upon diversity of citizenship between plaintiff and defendants as provided for in 28 U.S.C. §1332. Port City counterclaimed against Potashnick and his bonding company, Continental Casualty Company, (Continental Casualty), and Potashnick filed third-party complaints on the counterclaim against J. B. Converse

and Company, Inc. (Converse) and the City of Mobile (the City). The City cross-claimed against Converse and counterclaimed against Potashnick.[1]

The case was assigned to the docket of Judge W. Brevard Hand (Judge Hand) and remained on his docket until after trial and final judgement. Potashnick was represented by the law firm of Hand, Arendall, Bedsole, Greaves & Johnston (Hand, Arendall). Paul W. Brock (Brock), a partner in the Hand, Arendall law firm, was chief trial counsel for Potashnick.

The trial of the case commenced on August 4, 1975, before Judge Hand and a jury. During the testimony of the first witness presented by Potashnick, Judge Hand informed counsel for all parties that once a witness had commenced testifying that counsel was not to have any further discussions with the witness until he completed his testimony.[2] No party objected to the judge's rule at the time it was made. Port City's counsel and some of the counsel for other parties did not understand the rule to mean that counsel could not speak with the client during the time the client was testifying as a witness.[3] Thereafter, Port City's counsel violated the rule by discussing with B. G. Quinnelly, president of Port City and an individual defendant in the consolidated exoneration action, his proposed further testimony during a recess which occured between the commencement and completion of Quinnelly's testimony. Potashnick moved to disqualify Quinnelly from testifying due to the violation. During a lengthy hearing in

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[1] The case was consolidated for trial with another proceeding arising out of the same construction project and instituted by USF&G as plantiff against Port City, several individual indemnitors on Port City's bond, and W. D. Brunson, a subcontractor of Port City. The trial court's judgment in this companion case was affirmed by the Fifth Circuit in the decision sought to be reviewed and is not relavant to this petition.

[2] Judge Hand's instruction, as quoted by the Court of Appeals, 609 F.2d at 1117.

[3] Finding of Court of Appeals. 609 F.2d at 1106.

chambers, counsel for Port City also admitted violating another of the court's rules prohibiting counsel from informing a witness who had not testified of the testimony of a prior witness by referring to that witness by name. Counsel for Port City had violated that rule by telling his expert witness the name and substance of the testimony of Potashnick's expert witness for the purpose of eliciting the opinion of its expert as to the opinion of Potashnick's expert's testimony and for getting expert explanation of testimony of Potashnick's expert. Potashnick moved to disqualify that expert witness also. Judge Hand then granted Potashnick's motion to disqualify Quinnelly from testifying further and also granted Potashnick's motion to prohibit Port City's expert witness from testifying on matters with respect to which the court's rule had been violated by telling Port City's expert the name of Potashnick's expert. Judge Hand then said he would be willing to grant Port City a mistrial if Port City so requested and to assign the case to a new judge for trial before another jury if Port City requested. Port City for the reasons stated in the opinion of the Court of Appeals did not accept that offer.[4] Counsel for Port City's bonding company then suggested an alternative of proceeding without a jury. After all other parties and Judge Hand indicated that they would acquiesce in such a procedure, Port City waived its right to jury trial, requested the court to hear the case non-jury, and agreed not to object on appeal to the case being heard non-jury. Trial of the case then resumed, and after 33 days of actual trial the case was concluded. Judgement was entered by the court on March 26, 1976, in favor of Potashnick and Converse and against Port City, USF&G, and the City. A motion for a new trial was filed by Port City and USF&G and denied, and the case was subsequently appealed.

After filing its notice of appeal, Port City filed a motion in the Court of Appeals for a limited remand to allow it to file a motion for a new trial on the ground that the trial judge was unqualified to

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[4] 609 F.2d at 1106 and 1117.

try the case. The Court of Appeals remanded the case and it was ultimately assigned to Judge William Stafford (Judge Stafford) of the Northern District of Florida. After a hearing, Judge Stafford entered an amended opinion on June 1, 1978, denying tne motion for new trial, finding that there was no reasonable basis to question Judge Hand's impartiality and that Judge Hand's father did not act as a lawyer in the proceeding by virtue of his partner acting as a lawyer nor did Judge Hand's father have an interest known to Judge Hand which could have been substantially affected by the outcome of the case.[5] Judge Stafford's order was then appealed and that appeal was consolidated in the Court of Appeals with the earlier appeal from Judge Hand's judgment.

In addressing the findings and conclusions of Judge Stafford on the motion for the new trial based on the ground that the trial judge was disqualified to try the case and in addressing the evidence before the Court of Appeals on that issue the Court of Appeals stated:

> "The motion to disqualify was heard by District Court Judge William Stafford, Jr. of the Northern District of Florida. Based on the affidavits, exhibits, and argument, Judge Stafford found that prior to his appointment to the federal bench, Judge Hand had practiced law in Mobile, Alabama. Judge Hand and Paul Brock had been partners in Hand, Arendall and they enjoyed an ongoing friendly relationship. During the time they were law partners Judge Hand and Brock would occasionally invest with clients and one or more other members of the firm in real estate to be held for future development. Most of these purchases occurred many years ago, prior to Judge Hand's appointment to the bench. The

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[5] Appendix to Petition for Writ of Certiorari at 12d.

improved properties have always been managed by professional managers or developers with no active management by Judge Hand or Brock. During the period of time the Potashnick case was before Judge Hand, he and Brock did not make any joint investments, but several transactions took place involving property in which Judge Hand had a small interest. The transactions included the assignment of a mortgage and rents from an apartment building, and several conveyances of property interests. Additionally, in 1973 two lawsuits were filed in the circuit court of Mobile County relating to some property in which Judge Hand and Brock had an interest. The first of these suits, Blackman v. Lurlyne Land Co., involved property in which Judge Hand had previously held an interest. While the judge was not named defendant and had no connection with the corporate defendants in the action, the release Brock prepared to settle the case included Judge Hand. The second lawsuit, entitled Hufstutler v. Lurlyne Land Co., originally did not name Judge Hand as a defendant, but the complaint was subsequently amended to include Judge Hand, Brock, and others as defendants. On the day final judgment was entered in Potashnick, Brock wrote a letter to all the named defendants in Hufstutler informing them of the amended complaint and suggesting that they contact their insurance carriers. In that same letter Brock offered to make an appearance on behalf of the defendants to prevent default until they could determine their insurance coverage. On April 21, 1976, Brock filed such an appearance on behalf of all defendants; at that time Judge Hand had

already denied the motion for new trial in Potashnick. Amended Opinion and Order on Limited Remand, Record, vol. 7, at 1579-84.

As to the relationship of Judge Hand's father to the Hand, Arendall firm, Judge Stafford found that Charles C. Hand was the senior partner of Hand, Arendall. At the time Judge Hand was appointed to the federal bench, his father was eighty years old and had limited participation in the affairs of the firm. During the time Potashnick was pending Mr. Hand received one percent of the firm's income, but at some point prior to the entry of judgment in the case his income was changed to a fixed amount unrelated to the income of the firm. Judge Stafford's opinion also notes that Hand, Arendall's fee for its participation in Potashnick was at a fixed hourly rate from the inception. Accrued fees were billed monthly and paid promptly. Id. at 1586.

Judge Stafford ruled that the applicable statutory provision relating to judicial disqualification was the amended version of 28 U.S.C. §455. Applying the relevant sections of the statute, Judge Stafford found no reasonable basis for disqualification of Judge Hand . . ."[6]

The Court of Appeals thereafter stated:

". . . The district court found no reasonable basis for disqualification on these grounds, Judge Stafford noting that "it is indeed difficult to imagine that Judge Hand would be impartial [sic] because of any interest he shares with Brock or others in investments unconnected with this litigation." Amended Opinion and Order on Limited

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[6] 609 F.2d at 1106.

Remand, Record, vol. 7, at 1585. We disagree with this conclusion of the district court . . ."[7]

The Court of Appeals thereafter stated:

"[5] In deciding that Judge Hand should have disqualified himself under 28 U.S.C. §455 (a) on the grounds discussed above, we note that "[t]he issue of disqualification is a sensitive question of assessing all the facts and circumstances in order to determine whether the failure to disqualify was an abuse of sound judicial discretion." 1974 U.S. Code Cong. & Admin. News, pp. 6351, 6355. The amendment of 28 U.S.C. §455 did not alter the standard of appellate review on disqualification issues; (emphasis added) however, the new statute requires a judge to excercise his discretion in favor of disqualification if he has any question about the propriety of his sitting in a particular case. Under the prior version of section 455, a judge faced with a close question on disqualification was urged to resolve the issue in favor of a "duty to sit." See Edwards v. United States, 334 F. 2d 360, 362 n. 2 (5th Cir. 1964), cert. denied, 379 U.S. 1000, 85 S. Ct. 721, 13 L.Ed. 2d 702 (1965). The language of the new statute eliminates the so-called "duty to sit." The use of "might reasonably be questioned" in section 455(a) (emphasis added by court) clearly mandates that it would be preferable for a judge to err on the side of caution and disqualify himself in a questionable case. In reviewing the excercise of judicial discretion in this case, we cannot ignore that the disqualification of a judge in any given case does not cause the delay or inconvenience which resulted in

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[7] 609 F.2d at 1110.

> prior times. The growing number of federal judges, and the availability of rapid transportation to move those judges from place to place when necessary, make the decision to disqualify much less burdensome on the judicial system than in times past; any inconvenience which does arise is more than outweighed by the need to protect the dignity and integrity of the judicial process. Our desire to maintain an untarnished judiciary compels us to hold that Judge hand was required by 28 U.S.C. §455(a) to disqualify himself from the Potashnick case, and his failure to do so constituted an abuse of sound judicial discretion. (Emphasis added.)[8]

In addition to presenting for review the issue of the trial judge's disqualification Port City also asserted on appeal that the order of the trial judge prohibiting a client's communication with his or its counsel during the period of time that the client was testifying as a witness impinged upon the civil litigant's right to be represented by hired counsel. Port City and B. G. Quinnelly individually argued on appeal that their federal Constitutional right to be represented by hired counsel in civil litigation was derived from the Fifth Amendment right to due process and the Seventh Amendment right to trial by jury in civil litigation. The Court of Appeals held that the right to retain counsel in civil litigation is implicit in concept of Fifth Amendment due process and that the order of the trial judge prohibiting a litigant from consulting with his attorney during breaks and recesses in the litigant's testimony impinged upon that right. Is so holding the Court of Appeals stated:

> "[15] Recognizing that a civil litigant has a constitutional right to retain hired counsel, we hold that Judge Hand's rule prohibiting a litigant from

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[8] 609 F.2d at 1111.

consulting with his attorney during breaks and recesses in the litigant's testimony impinges upon that right. We draw our support from Geders v. United States, 425 U.S. 80, 96 S. Ct. 1330, 47 L. Ed. 2d 592 (1976). In Geders a trial court order prevented the defendant in a federal criminal prosecution from consulting his attorney "about anything" during a seventeen hour overnight recess in the trial between his direct and cross-examination. The Supreme Court held that the trial court order impinged upon defendant's sixth amendment right to the assistance of counsel. 425 U.S. at 91, 96 S. Ct. 1330.

"[16] We note at the outset that certain distinctions can be made between the rights of civil litigants and those of criminal defendants. A criminal defendant's right to counsel arises out of the sixth amendment, and includes the right to appointed counsel when necessary. (Citation omitted.) A civil litigant's right to retain counsel is rooted in fifth amendment notions of due process; the right does not require the government to provide lawyers for litigants in civil matters. (Citation omitted.) A criminal defendant faced with a potential loss of his personal liberty has much more at stake than a civil litigant asserting or contesting a claim for damages, and for this reason the law affords greater protection to the criminal defendant's rights.

Notwithstanding the civil-criminal dichotomy, an analogy can be drawn between the criminal and civil litigants' respective rights to counsel. In both cases the litigant usually lacks the skill and knowledge to adequately prepare his case, and he requires the guiding hand of counsel at every step in the proceedings against him. (Citation

omitted.) In each instance, the right to counsel is one of constitutional dimensions and should thus be freely exercised without impingement. The Geders decision emphasizes the importance of permitting communication between attorney and client during trial recesses.

It is common practice during such [overnight] recesses for an accused and counsel to discuss the events of the day's trial. Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events. Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance.

425 U.S. at 88, 96 S. Ct. at 1335. The need for attorney-client communication is certainly no less in a civil case.

In Geders, as in the instant case, the trial court's controverted order was imposed to avoid possible "coaching" of witnesses. The Geders court noted several alternative ways to avoid improper influences on testimony but concluded that "[t]o the extent that conflict remains between the defendant's right to consult with his attorney during a long overnight recess in the trial, and the prosecutor's desire to cross-examine the defendant without intervention of counsel, with the risk of improper 'coaching,' the conflict must . . . be

resolved in favor of the right to the assistance and guidance of counsel." Id. at 91, 96 S. Ct. at 1337. The court in Geders specifically limited its decision to the particular circumstances before it — an order preventing attorney-client consultation "about anything" during a 17-hour overnight recess. 425 U.S. at 91, 96 S. Ct. 1330. Judge Hand's rule in the instant case similarly prohibited "any further conversations" with a witness once his testimony commenced, and the application of the rule barred the president and sole shareholder of defendant Port City from talking to his attorney for a period of seven days, including several overnight recesses. Judge Hand's denial of any attorney-client communication for such an extended period of time resulted in a significant deprivation of the effective assistance of counsel and thus impinged upon Port City's constitutional right to retain counsel."[9]

VI

REASONS FOR DENYING THE WRIT

ARGUMENT 1

28 U.S.C. 455 as amended became effective on December 5, 1974. Section 3 of Pub. L. 93-512, 88 Stat. 1609 provided:

> "This Act (amending this section) shall not apply to the trial (emphasis added) of any proceeding commenced prior to the date of this Act (Dec. 5, 1974), nor to appellate review of any proceeding which was fully submitted to the reviewing court prior to the date of this act."

Had it been the Congressional intent that the amendment to 28 U.S.C. 455 should not apply to any proceeding commenced prior

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[9] 609 F.2d at 1118.

to December 5, 1974 it would have been a simple matter to have mandated that it should not apply to any proceeding commenced prior to the effective date of the Act. However it expressly mandated that the amended Act shall not apply to the trial of any proceeding commenced prior to the effective date of the Act. Further, the Court of Appeals specifically addressed the legislative history of the amended Act in arriving at its conclusion that it was the Congressional intent to apply the Act to any proceeding pending in the Court on the effective date of the Act when the trial had not commenced. In footnote 6 of the opinion the Court of Appeals stated:

> "6. The legislative history of amended 28 U.S.C. §455 does provide some support for applying the statute in this case. The sectional analysis set forth in the House Report states that "Section 2 [sic] makes the bill inapplicable to trials commenced and to appellate matters which were fully submitted prior to the effective date of the Act." 1974 U.S. Code Cong. & Admin. News, pp. 6351, 6362. The negative implication of this sectional analysis is that the statute applies to trials commenced subsequent to the effective date, regardless of when the proceeding was instituted. Under this interpretation amended 28 U.S.C. §455 would clearly apply to the instant case, the trial of which commenced in August, 1975."[10]

The Court of Appeals application of 28 U.S.C. 455 as amended effective December 5, 1974 to the trial judge in this cause did not violate the clear Congressional mandate. The trial did not commence until August 4, 1975.

ARUGUMENT 2

In their second argument the Petitioners take issue with the following statement made by the Court of Appeals in its opinion:

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[10] 609 F.2d at 1110.

> . . .; however, tne new statute requires a judge to excercise his discretion in favor of disqualification if he has any question about the propriety of his sitting in a particular case. . . . ."[11]

Petitioners argue that the "problem" with the above quoted statement made by the Court of Appeals is twofold.

Petitioners argue that the first "problem" is that the discretion of the trial judge is eliminated by directing which of two alternatives must be chosen. Respondents assume that Petitioners are taking issue with the mandate of the Court of Appeals that if a trial judge has any question about the propriety of his sitting in a particular case then as to the alternatives of exercising his discretion in favor of his "duty to sit" or exercising his discretion in favor of his duty to recuse, he must exercise his discretion in favor of the latter. The language of 28 U.S.C. 455(a) is clear and unambiguous in mandating that the trial judge "shall disqualify himself" if his impartiality "might reasonably be questioned." If the above quoted statement creates any "problem" for a trial judge it was a "problem" created by a clear congressional mandate and not by an erroneous statutory interpretation made by the Court of Appeals.

Petitioners argue that the second "problem" with the above quoted statement is that the Court of Appeals, in directing that a trial judge must exercise his discretion in favor of disqualification if he has any question about the propriety of his sitting in a particular case, has eliminated or disregarded the statutory requirement that the judge must only disqualify himself if his impartiality might reasonably be questioned. The Petitioners argument concerning the second "problem" is invalid. The Court of Appeals repeatedly recognized that the trial judge is only obligated to disqualify himself if his impartiality might "reasonably be questioned" and in reading the above quoted statement made by the Court of Appeals it must be taken in context with the entire opinion.

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[11] 609 F.2d at 1112.

The Court of Appeals found from the evidence that the relationship between Judge Hand and Potashnick's chief trial counsel, Brock, was of the nature that it gave rise to the impartiality of Judge Hand being reasonably questioned. The Court of Appeals further found that Judge Hand's failure to disqualify himself because of his connection with Brock constituted an abuse of sound judicial discretion. Under their second argument the Petitioners argue in substance that the Court of Appeals erred in finding from the evidence that the connection between Judge Hand and Brock gave rise to a reasonable person, had he been aware of all of the connections, reasonably questioning Judge Hand's impartiality. Respondents reply that the Court of Appeals could not have reasonably arrived at any other conclusion. Further, it is not within the proper function or scope of a petition for a writ of certiorari to ask this Honorable Court to review a decision of a court of appeals on the ground that the court's finding of fact based upon the record on appeal was an erroneous finding.

ARGUMENT 3

In the third argument the Petitioners contend in substance that the Court of Appeals had no legal authority to make an appellate court finding that Judge Hand abused his discretion in failing to disqualify himself because Judge Stafford had made a finding that Judge Hand was not disqualified and that in view of an apparently contended conclusive judicial presumption that Judge Stafford was a reasonable man, the finding of Judge Stafford is conclusive that Judge Hand did not abuse his discretion. Respondents can only reply to Petitioners' argument in that regard by saying that the Petitioners' conclusion is invalid because the premises from which it is deduced are not true. The granting or denial of a motion for a new trial is within the sound judicial discretion of the judge ruling upon it. The Court of Appeals in effect found that Judge Stafford abused his discretion in denying the motion for the new trial.

Petitioners further argue in substance that Port City's failure to

file the motion for a new trial on the ground that the trial judge was disqualified until after final judgment was rendered against it "should be a significant factor in the resolution of the question." The Petitioners made the same argument to the Court of Appeals. The Court of Appeals found from the affidavit of Port City's attorney that although Port City's attorney was at all time aware of the fact that Judge Hand's father was the senior partner in the Hand, Arendall law firm, Port City's attorney did not discover the business relations and other continuing associations between Judge Hand and Brock until the trial of the case was concluded. In addressing that issue the Court of Appeals stated:

> "[10] This court has decided that Judge Hand was disqualified from participating in the Potashnick proceeding on two separate grounds. The judge's business dealings with Paul Brock constituted a ground for disqualification under section 455(a). Had the judge fully disclosed his relationship with Brock on the record, the parties could have waived this ground. During a pretrial conference with the attorneys Judge Hand stated that he was aware that remarks had been made suggesting that he would not be impartial due to his prior association as a partner in the Hand, Arendall law firm. The judge indicated he would favorably consider a motion to recuse himself made by any party. All of the attorneys involved asked Judge Hand not to recuse himself, since recusal would greatly delay trial of the case, all the lawyers knew of the prior association, and the case had been on Judge Hand's docket since October, 1973, and if any attorney had a question about the judge's impartiality a motion should have been filed previously. Under the express language of section 455(e), the pretrial conference proceedings cannot constitute a valid waiver. The judge's disclosure of his prior relationship with Hand,

> Arendall did not reveal the nature of his relationship to Paul Brock. The affidavits submitted as part of the motion to disqualify indicate that Port City's attorney did not discover the Brock-Hand connection until the trial was concluded, so that any waiver of disqualification would not apply to that ground."[12]

Port City did not waive any right to file a motion for a new trial on the ground that the trial judge was disqualified. There was no waiver of disqualification under 28 U.S.C. 455(a) because neither Port City nor its attorney had any knowledge of the continuing associations and connections between Judge Hand and Brock and Judge Hand failed in his duty under 28 U.S.C. 455(e) to disclose his continuing business and professional connections with Brock or with his former law firm or with other former law partners. That being so, he failed to comply with the mandate imposed upon him by 28 U.S.C. 455(a) to disqualify himself if his impartiality might reasonably be questioned.

It is provided in substance in 28 U.S.C. 455(b) that a trial judge shall disqualify himself if any person within the third degree of relationship is acting as a lawyer in the proceeding or when a relative lawyer is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding. 28 U.S.C. 455(e) further provides that no judge can accept from the parties a waiver of any ground for disqualification enumerated in 28 U.S.C. 455(b). Potashnick's chief trial counsel, Brock, was a law partner of Judge Hand's father, Charles C. Hand, the senior partner in the Hand, Arendall law firm. Although the Court of Appeals found that Judge Hand's father was not acting as a lawyer in the proceeding it did find that he had an interest that could be substantially affected by the outcome of the proceeding.

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[12] 609 F.2d at 1114.

ARGUMENT 4

The Court of Appeals held substance that it is always assumed that a partner will have some interest in litigation in which his law firm represents a litigant and that if a partner is within the third degree of relationship to the trial judge the relative partner has an interest which is known by the judge that could be substantially affected by the outcome of the proceeding and that under such circumstances a trial judge is mandatorily obligated to disqualify himself in compliance with the mandate of 28 U.S.C. 455(b)(5)(iii). In so holding the Court of Appeals stated:

> "Underlying our decision to disqualify Judge Hand is the assumption that a partner will always have some interest which could be affected by the outcome of a proceeding handled by his law firm. However, a recent advisory opinion interpreting Canon 3C of the Code of Judicial Conduct suggests that apart from any interests involved, the partner status of the judge's relative by itself is sufficient ground for disqualification. Titled "Disqualification in a case in which a relative is employed by a participating law firm," the opinion notes the distinction between law firm associates and partners, and states:
>
> > We believe the following conclusions find support in the Code [of Judicial Conduct]. A judge is disqualified and should recuse if a relative within the third degree of relationship to the judge or his spouse (a) is a partner in a law firm appearing in the case; or (b) will profit or lose from the judge's action in the case either financially or otherwise, for example, the reputation of the firm would be significantly affected by the litigation.
>
> Advisory Committee on Judicial Activities, Advi-

> sory Opinion No. 58 (1978) (emphasis added). The use of "or" in the quoted language above indicates that either an interest or partner status of the relative will require disqualification. The advisory opinion, in conformity with our holding in this case, advocates automatic disqualification of a judge based on his relation to a law firm partner . . ."[13]

The only factual determination which must be made is (1) is a trial judge's relative within the third degree of relationship a partner in a law firm which represents a litigant in a case on the trial judge's docket and (2) does the trial judge have knowledge of the partner's relationship to him. Petitioners argue that the holding of the Court of Appeals is incorrect. Respondents can only reply that the holding of the Court of Appeals is correct.

ARGUMENT 5

In their fifth and sixth arguments the Petitioners argue in substance that the Court of Appeals erred in the following respects:

1. The Court erred in "extending" the holding of this Honorable Court in Geders v. United States, 425 U.S. 80, 47 L.Ed. 2d 592, 96 S. Ct. 1330, (1976).

2. The Court erred in holding that the right of the corporation Port City to be represented by hired counsel had been impinged upon by the trial judge's order limiting the right of its sole officer and stockholder, B. G. Quinnelly, to communicate with counsel for a period of approximately seven days due to the fact that Port City's bookkeeper and office manager had the right to communicate with Port City's counsel during the testimony of B. G. Quinnelly.

3. The Court of Appeals "violated the most fundamental rule of appellate procedure" in reversing the case based upon its "extention" of the rationale of Geders because (a) no objection was made to the court's order limiting the client's right to communi-

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[13] 609 F.2d at 1114.

cate with counsel at the time the order was made or at any subsequent time and (b) the trial court offered Port City a mistrial at the time it became apparent to Port City that the trial judge's order included a prohibition of communication with the client as well as non-party witnesses and Port City refused to accept the offered mistrial.

The exoneration action filed by USF&G was consolidated for trial with the action commenced against Port City by Potashnick. B. G. Quinnelly and Marie Quinnelly were individual defendant's in the exoneration action. Therefore, when B. G. Quinnelly took the stand to testify during the trial he was testifying in his dual capacity as the sole officer and stockholder of Port City and on his own behalf as an individual defendant. Port City's bookkeeper and office manager, Marie Quinnelly, also testified in such dual capacity. The Court of Appeals did not address the fact of B. G. Quinnelly and Marie Quinnelly testifying as individual defendants but limited its opinion to addressing the issue of whether the prohibition of communication by the sole officer and stockholder of Port City during his testimony impinged upon the corporation's constitutional right to be represented by hired counsel. The Court of Appeals correctly held that the fact that the corporation's bookkeeper and office manager could communicate with the corporation's counsel during the testimony of the sole officer and stockholder did not cure the error of impinging upon the corporation's right to communicate through its officers with corporate counsel.

The Court of Appeals did not "extend" the principle of law pronounced by this Honorable Court in Geders it simply correctly applied the principle of law to the facts of this case.

Petitioners argue in substance that the issue that Port City was denied its federal constitutional right to be represented by hired counsel was not properly considered on appeal because no objection was made to the trial court's order that the president of Port City (and the other individual defendants who were included in the designation "Port City,") could not communicate with

counsel about their testimony for so long as they were testifying as a witness. Petitioners made the same argument to the Court of Appeals.

Rule 46 of the Federal Rules of Civil Procedure (FRCP) provides in substance that a party, at the time the order or ruling of the court is made, must make known to the court his objection to the order or ruling and his grounds therefor; and if a party has no opportunity to object to an order of the court at the time it is made, the absence of an objection does not thereafter prejudice him. Rule 61 FRCP provides in substance that no error in any ruling or order by the court is ground for disturbing a judgment unless refusal to disturb the judgment appears inconsistent with substantial justice, and the court must disregard any error that does not affect a substantial right of a party. The United States courts of appeals act in accordance with Rule 61 FRCP. In addition, 28 U.S.C. 2111, which applies to appellate courts, states a principle which is in substance the same as Rule 61 FRCP. Bell v. Swift and Company, 283 F. 2d 407 (5 Cir. 1970); Wright and Miller, Federal Practice and Procedure, Vol. 11, Rule 61, Section 2882, Page 273.

The court's order denying Port City the right to communicate with counsel through B. G. Quinnelly, its president and sole stockholder, for so long as B. G. Quinnelly was testifying as a witness, was plain error affecting a substanial federal constitutional right. The order prohibiting such communication was properly considered on appeal even in the absense of objection thereto. Federal Rules of Evidence, Rule 103; Harris v. Smith, 372 F. 2d 806 (8 Cir. 1967). In considering the issue raised by Port City pertaining to denial of right to be represented by counsel it was necessary for the Court of Appeals to answer the following questions, which were argued in brief to the Court of Appeals:

QUESTIONS

1. Does a party in civil litigation have a federal constitutional right to be represented by hired counsel? If so;

2. Did the trial court's order restricting or limiting a party's right

to communicate with counsel deny or impinge upon that right? If so;

3. Did counsel's failure to object to the order when it was made, under the circumstances of this case, constitute a waiver of the error under Rule 46 FRCP?

4. Does the order constitute plain error? If so;

5. If the order does constitute plain error, did it affect a substantial right of the Respondents, or was it harmless error?

ANSWERS TO QUESTIONS

1. The 6th Amendment to the Constitution of the United States of America guarantees a defendant in a criminal prosecution a right to be represented by counsel. Respondents argued that they have a constitutional right to be represented by hired counsel in a civil litigation by virtue of the 5th and 7th Amendments to the United States Constitution.

The 5th Amendment to the Constitution provides, among other things, that no person shall be deprived of life, liberty, or property without due process of law. In Watson v. Towbridge, 382 F. 2d 807 (2nd C.C.A. 1967) the court stated on page 811 of the decision in part:

> ". . . Nevertheless, the flexibility which is inherent in the concept of due process of law precludes the dogmatic application of specific rules developed in one context to entirely distinct forms of government action. 'For thou "due process" generally implies and includes actor, reus, judex (emphasis added by court) regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings, (emphasis added) . . . yet, this is not universally true' . . . (Citations omitted.)

In Gideon v. Wainwright, 372 U.S. 335, 9 L.Ed. 2d 799, 83 S. Ct. 792 (1963) the Supreme Court of the United States ruled that the 6th Amendment right to counsel in criminal cases was one of those amendments included in the Bill of Rights which is funda-

mental and essential to a fair trial and therefore the 6th Amendment right to counsel was imposed upon the States by the 14th Amendment. In so holding the court stated on page 805 of the Lawyers Edition:

> ". . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in Powell v. Alabama:
>
> > 'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be *heard by counsel.* (373 US 345) Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissable. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of

> counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.'
> (Citations omitted.)

Of course we are not here concerned with the question of whether or not a party is entitled to have counsel appointed for him in a civil case when he is sued and thereby put in jeopardy of losing his property. The only issue raised in the Court of Appeals is a party's right to be represented by hired counsel in civil litigation and the limits or restrictions which may properly be placed upon that right by the trial court. Can it reasonably be said that the necessity of an attorney in civil litigation is any less important than in a criminal prosecution? In one a party is in jeopardy of losing his liberty and in the other he is in jeopardy of losing his property. Also, if due process includes the right to a trial according to some settled course of judicial proceedings and also includes all rights which are fundamental and essential to a fair trial, then a party in a civil case is entitled to be represented by counsel by virtue of the 5th Amendment. It is definitely a settled course of judicial proceedings in civil litigation to have the right to be represented by counsel and that right is as fundamental and essential to a fair trial in civil cases as it is in criminal cases.

In John A. Geders v. United States, 425 U.S. 80, 47 L.Ed. 2d 592, 96 S. Ct. 1330, this Honorable Court ruled that a district court judge's order that a defendant in a criminal case could not talk to his attorney during a seventeen hour overnight recess impinged upon the defendant's right to be represented by counsel as guaranteed to him by the 6th Amendment. In this case the Court's order deprived Port City and B. G. Quinnelly individually of the right to confer with their attorney about their testimony for a period of approximately seven days while B. G. Quinnelly was testifying as the only officer and sole stockholder of Port City and testifying in his individual behalf as an individual party defendant

in the consolidated exoneration action filed by USF&G and deprived Port City and Marie Quinnelly of the right to confer with their attorney for a period of approximately two days while Marie Quinnelly testified as the bookkeeper of Port City and in her individual behalf as a party defendant in the exoneration action. In Geders this Honorable Court stated on page 599 of the Lawyers Edition:

> "The recess at issue was only one of many called during a trial that continued over 10 calendar days. But it was an overnight recess, 17 hours long. It is common practice during such recesses for an accused and counsel to discuss the events of the day's trial. Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events. Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill equipped to understand and deal with the trial process without a lawyer's guidance.
>
> 'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. ... (A defendant) is unfamiliar with the rules of evidence ... He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings

against him.' Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

This Honorable Court further stated on page 601:

> "The challenged order prevented petitioner from consulting his attorney during a 17-hour overnight recess, when an accused would normally confer with counsel. We need not reach, and we do not deal with, limitations imposed in other circumstances. We hold that an order preventing petitioner from consulting his counsel 'about anything' during a 17-hour overnight recess between his direct and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment."

In a separate concurring opinion, Justices Marshall and Brennan stated on page 602:

> "The only justification expressly considered by the Court in its opinion is the desire to avoid the risk of unethical counselling by an attorney. The Court holds that the fear of unethical conduct is not a sufficient ground for an order barring overnight communication between a defendant and his attorney, and the same would hold true absent the most unusual circumstances, I take it, for an order barring consultation between a defendant and his attorney at any time before or during the trial. If our adversary system is to function according to design, we must assume that an attorney will observe his responsibilities to the legal system as well as to his client. I find it difficult to conceive of any circumstances that would justify a court's limiting the attorney's opportunity to serve his client because of fear that he may disserve the system by violating accepted ethical standards. (Emphasis added.) If any order barring communication between a defendant and his

> attorney is to survive constitutional inquiry, it must be for some reason other than a fear of unethical conduct.'

See also: U.S. v. Allen, 542 F. 2d 630 (4 Cir. 1976)

Port City argues that the record on appeal affirmatively discloses that Port City's motion to discharge the jury and agreement not to assign the loss of the jury as error on appeal was made under duress and was not a valid waiver made under circumstances whereby Port City's attorney had any real choice. Even the trial judge recognized that Port City was given a "Hobson's choice." (Tr.4582) However, even if there was an effective waiver of Port City's right to a trial by jury, which Respondents deny, nevertheless, the court thereafter prohibited Respondents from talking with their counsel about their testimony and case for a period of approximately seven days and two days, respectively, even after the jury was discharged. To preclude Respondents from talking about their "testimony" was to preclude Respondents from talking to their counsel about the merits of their case at all. In a case of this magnitude which involved the number of issues involved it was impossible to anticipate everything which may be raised during direct examination of a party or examination or cross-examination of a party prior to the time such direct examination or cross-examination commences. It is necessary for a lawyer to have continuing communication with his client in order to effectively represent the client and it is necessary for the client to have a right to continuing communication with his attorney in order to assist the attorney and to have the fulfillment of the right to counsel as guaranteed by the Constitution of the United States. The trial judge's order was designed to prevent coaching of the witness on the part of the lawyer. As Mr. Justice Marshall said in his concurring opinion in Geders:

> ". . . If our adversary system is to function according to design, we must assume that an attorney will observe his responsibilities to the legal system, as well as to his client . . ."

The trial judge did not make such assumption. The trial judge's

order denied Respondents their constitutional right to be represented by counsel in civil litigation. This Honorable Court in Geders held that when the constitutional right to be represented by counsel is violated it is not necessary to show prejudice because prejudice is presumed. However, in this case no greater prejudice could have been shown than the fact than an unintended violation by Port City's attorneys of the trial judge's unconstitutional order prohibiting the witness-client from communicating with his attorney resulted in Respondents being deprived of their constitutional right to a trial by jury.

2. Port City (and the other individual defendants B. G. Quinnelly and Marie Quinnelly) were prohibited for a period of days from communicating with their counsel about their "testimony." The prohibition effectively prohibited them from communication with counsel about their case because a discussion of any aspect of the case would have pertained to matters to which they had already testified or may or would be expected to testify in their further examination as a witness. The principle of law pronounced in Geders v. United States, supra, is controlling in this case. Therefore, Respondents' right to the effective assistance of counsel was impinged upon by the trial judge's order.

3. Port City's counsel did not object to the order when it was made because the order was not understood to restrict or limit communication with the client. Therefore, it had no opportunity to object to the order until it was too late. Under these circumstances, even if an objection was necessary, by the express provision of Rule 46 FRCP, the absense of an objection did not prejudice the right of Port City to have the order of the trial judge reviewed on appeal.

4. The restriction or limitation of a party's right to communicate with counsel is a federal constitutional error, and all federal constitutional errors are plain error and may be reviewed on appeal, even though not objected to at the trial court. Harris v. Smith, supra; Federal Rules of Evidence, Rule 103; Chapman v. California, 386 U.S. 18, 17 L. ed. 2d 705, 87 S. Ct. 824, reh. den. 386 U.S. 987, 176 L. ed. 2d 705, 87 S. Ct. 824 (1967).

5. Although all federal constitutional errors constitute plain error, nevertheless, a federal constitutional error may be harmless error. It is a harmless error if it does not affect a substantial constitutional right of the complaining party. However, before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. Chapman v. California, supra. The impingement upon a party's constitutional right to the assistance of counsel is the denial of a substantial right as a matter of law and prejudice is presumed to have resulted from the unconstitutional order. Geders v. United States, supra. In this case the record affirmatively reflects that Port City was placed in the position of (1) losing the essential testimony of the client, or, (2) losing its jury or (3) suffering a mistrial after approximately seven weeks of trial, because of its counsel's violation of the trial court's unconstitutional order (which was unintentional because the order was not understood to limit communication with the client). Therefore, the Court of Appeals did not have to indulge in any presumption of prejudice. Actual prejudice was affirmatively disclosed by the record on appeal.

Even though Port City declined the offer of a mistrial the trial judge thereafter presisted for the remainder of the non-jury trial in enforcing his order limiting communication with counsel by the client.

ARGUMENT 6

28 USC 455 as amended effective December 5, 1974 did not alter the standard of appellate review on disqualification issues. The standard of appellate review has at all time been a determination of whether there was an abuse of sound judicial discretion. 28 USC 455(b) as amended specifies certain grounds of disqualification for which a trial judge can not accept a waiver. The Court of Appeals held in effect that the trial judge was disqualified because his father was the law partner of Brock, Potashnick's chief trial counsel, and that consequently Judge Hand's father had an interest known to Judge Hand which could be substan-

tially affected by the outcome of the proceeding. Therefore, Judge Hand abused his discretion in failing to disqualify himself under 28 USC 455(b)(5)(iii). However, prior to the amendment of the Act 28 USC 455 mandated that a trial judge shall disqualify himself if he was so related to or connected with any party or his attorney as to render it improper, "in his opinion," for him to sit on the trial. The Court of Appeals found that Judge Hand was so related to or connected with Brock as to render it improper for him to sit on the trial and that notwithstanding "his opinion" to the contrary Judge Hand abused his sound judicial discretion in refusing to disqualify himself. Under the facts of this case, because of the Judge Hand-Brock connection, the Court of Appeals found that Judge Hand abused his sound judicial discretion and the case for that reason was due to be reversed under 28 USC 455 in effect on the date the action was commenced or as amended effective December 5, 1974. Therefore, since under the facts of this case Judge Hand should have disqualified himself under either statute a determination by this Honorable Court as to whether the Court of Appeals erroneously applied the amended Act to the trial judge would be a purely academic determination.

ARGUMENT 7

The amended version of 28 USC 455 became effective on December 5, 1974. Notwithstanding a conflict among the courts of appeals as to the proper application of 28 USC 455 as amended to trial judges in the courts of appeals the lapse of time from the effective date of the statute to the present date has for all practical purposes rendered moot the issue of whether the Act applied to trial judges in all cases where the trial had not commenced or whether it applied to all proceedings commenced subsequent to the effective date of the amended statute. A decision by this Honorable Court on that issue may have academic significance but it would have no substantial significance to any existing or future cases.

VIII

CONCLUSION

For the reasons argued hereinabove Respondents respectfully submit that the petition for Writ of Certiorari is due to be denied. The interest of USF&G on the issues raised in the petition for Writ of Certiorari are identical to the interest of Port City and USF&G therefore joins Port City in making this joint response to the petition for Writ of Certiorari.

Respectfully submitted.

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CERTIFICATE OF SERVICE

We hereby certify that pursuant to the Supreme Court Rules we have this 29th day of May, 1980, served copies of this Brief in Opposition to Petition for Writ of Certiorari by mailing copies of the same to G. Hamp Uzzelle, Esq., Broox G. Holmes, Esq. and William H. Brigham, Esq. at their correct mailing addresses by United States Mail, first class postage prepaid.

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